

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLIFFORD NELSEN)	
Claimant)	
VS.)	
)	
MID-STATES ARMATURE WORKS, INC.)	Docket No. 211,136
Respondent)	
AND)	
)	
INSURANCE COMPANY OF NORTH AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from the October 25, 1996, Award entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral arguments on February 20, 1997.

APPEARANCES

Claimant appeared by his attorney, John M. Ostrowski of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Richard J. Liby of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopts the stipulations listed in the Award.

ISSUES

The issues for Appeals Board review are the same as those presented for determination by the Administrative Law Judge and include the following:

- (1) The nature and extent of claimant's disability.
- (2) The average weekly wage.
- (3) The rate of payment for temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award by the Administrative Law Judge should be modified to correct the calculation of claimant's average weekly wage after December 15, 1995, so as to include the value of the fringe benefits provided claimant by the respondent, but that the Award should otherwise be affirmed in all respects.

The Appeals Board concurs with the findings of fact and conclusions of law of the Administrative Law Judge and hereby adopts said findings and conclusions as its own as if specifically set forth herein. Specifically, the Appeals Board finds claimant is entitled to a work disability following his termination from his employment with respondent on December 15, 1995. The respondent's argument that a post-accident wage should be imputed to claimant based upon his ability and/or pursuant to the rationale in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) is rejected for the reasons set forth in the Award. Furthermore, the record does not establish that claimant has not made a good-faith attempt to find work since being terminated by respondent. Accordingly, he has not, in effect, left the open labor market. Claimant testified concerning his efforts and his attempts to find employment, which included utilizing job placement services through the Kansas Department of Social & Rehabilitation Services. It is noted that if respondent were concerned about the level of effort claimant was putting forth towards finding work or his approach to locating and following up on employment opportunities, respondent had the option to provide vocational rehabilitation services, including job placement. However, they declined to do so.

Claimant does not dispute the accuracy of the restrictions imposed by the treating physician or the fact that there are jobs he can perform within those restrictions. He simply has been unable to secure suitable employment. We do not find from the record that claimant is deliberately remaining out of work in order to wrongfully manipulate his wage loss to inflate his work disability.

With regard to the calculation of claimant's average weekly wage, the Administrative Law Judge correctly noted that the fringe benefits for life insurance and health insurance which claimant received while working for respondent should not be added to the average weekly wage while those benefits continued. However, after claimant was terminated December 15, 1995, the Administrative Law Judge failed to include the value of those benefits in the wage computation. Accordingly, the Appeals Board finds the value of the life and health insurance benefits to be \$6.35 per week which would thereby increase claimant's gross average weekly wage from \$309.28 per week to \$315.63 per week after December 15, 1995, with a corresponding compensation rate of \$210.43.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated October 25, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Clifford Nelsen, and against the respondent, Mid-States Armature Works, Inc., and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred December 6, 1994, and based upon an average weekly wage of \$309.28 for 15.86 weeks of temporary total disability compensation at the rate of \$206.20 per week or \$3,270.33; followed by 28.99 weeks of permanent partial disability compensation at the rate of \$206.20 per week or \$5,977.74, or \$9,248.07, for a 7% general body disability; followed by 273.33 weeks of permanent partial disability compensation at the rate of \$210.43 per week, or \$57,516.83, for a 73% permanent partial work disability, making a total award of \$66,764.90.

As of March 17, 1997, there is due and owing claimant 15.86 weeks of temporary total disability compensation at the rate of \$206.20 per week or \$3,270.33; followed by 28.99 weeks of permanent partial disability compensation at the rate of \$206.20 per week in the sum of \$5,977.74; thereafter, beginning December 15, 1995, 65.43 weeks of permanent partial disability compensation at the increased rate of \$210.43 per week, or \$13,768.43, for a total of \$23,016.50, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$43,748.40 is to be paid for 207.90 weeks at the rate of \$210.43 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Vincent A. Burnett, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director